OCT 16 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO PETITION

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement	5
Reasons for Granting the Writ	12
Conclusion	17

TABLE OF CITATIONS

CASES

Allen v. duPont, et al. (1948) 75 F. Supp. 546	13
Berger v. United States, 255 U.S. 22	12
In Re Crawford's Estate, 160A. 585, 307 Pa. 102	13
In Re Murchison (1955), 349 U. S. 133	16
Paul Ginsburg, Appellant, v. Horace Stern, et al.	15
United States v. Shibley, 112 F. Supp. 734 (1953)	13

STATUTE

28 U.S.C. Sect. 144	4

INDEX TO APPENDIX

Opinion of the Court	1
Order	5
Sur Petition for Rehearing	6
Memorandum and Order	6
Memorandum and Order	9
Order	11
Motion to Reassign Cause	11
Motion for Reconsideration	12
Memorandum Opinion	13
Order	14
Motion for Reconsideration	15
Order of Court	16
Notice of Appeal	16
Affidavit of Paul Ginsburg, Interpleaded Defendant, Pursuant to Section 144 of the Judicial Code	17
Order of Court	21
Order	22

NOV 3 1958

245965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. .....

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Anne Livingston Behr respectfully prays that a writ of certiorari issue in the above captioned case to review the judgments of the United States Court of Appeals for the Third Circuit rendered therein May 18, 1956 (App. 1-5); Petition For Rehearing denied June 19, 1956 (App. 6).

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Pennsylvania (App. 6-7, 9-10, 13-14) are not reported. The pertinent ones are appended hereto because the Court of Appeals entertained and granted typewritten motions to dismiss the appeal before your petitioner as appellant had an opportunity to print and file them in an appendix therein. The opinion of the United States Court of Appeals for the Third Circuit (App. 1-5) is reported in 233 F. 2d 371.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 1254 of the Judicial Code.

The Court of Appeals denied Petition For Rehearing (App. 6) on June 19, 1956, without opinion. On August 24, 1956, Mr. Justice Burton of this Honorable Court entered an Order extending the time for filing Petition for Writ of Certiorari to and including October 17, 1956.

QUESTIONS PRESENTED

1. Is not an affidavit of prejudice or bias, filed by a party to an action pursuant to Section 144 of the Judicial Code, sufficient when a liberal construction of it shows that the judge whose disqualification is sought is prejudiced and biased not only against the party's cause and counsel but also in favor of the opposing parties and their attorneys?

2. Is not the action of a proper affidavit of prejudice, filed pursuant to Section 144 of the Judicial Code, automatic?

3. When pleadings contain allegations which are impertinent, false and scandalous as to counsel of record, should they be stricken pursuant to Rules 11 and 12(f) of the Federal Rules of Civil Procedure?

4. Does the striking of pleadings pursuant to Rules 11 and 12(f) of the Federal Rules of Civil Procedure render them a nullity?

5. Is not the action of the District Court in denying the motions to strike matter which is scandalous as to plaintiff's counsel, and likewise the action of the Court of Appeals in ignoring said motions to strike, discriminatory as to plaintiff and in conflict with a decision of the Court of Appeals at No. 11,499 wherein allegedly scandalous matter was stricken and impounded although it was pertinent and presumptively as well as assertedly true?

6. Does not the plaintiff's right to discovery pursuant to Rule 26(a) of the Federal Rules of Civil Procedure require that plaintiff's interrogatories for the purpose of discovery be answered before the defendants' interrogatories, even though the latter were filed first by reason of their being filed concurrently with their Answer?

STATUTE INVOLVED

The statutory provision involved in Section 144 of the Judicial Code, 28 U.S.C. Section 144, as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, sec. 65, 53 Stat. 99.

STATEMENT

Mrs. Anne Livingston Behr, widow, of Newport, Rhode Island, sued the defendants for damages, inter alia, resulting from a conspiracy to defraud her of her rights as a stockholder of the Carbon Monoxide Eliminator Corporation, one of the defendants. Jurisdiction below was based upon diversity of citizenship and an amount in excess of $3,000.00, exclusive of interest and costs. At the outset, a motion of defendants to dismiss the Complaint for failure to state a cause of action upon which relief can be granted was denied.

After numerous procedural difficulties, in the course of which it became obvious that the district judge repeatedly denied Mrs. Behr various rights, including her right to discovery, and repeatedly granted the defendants various "rights" to which they were not entitled, Mrs. Behr filed an Affidavit pursuant to Section 144 of the Judicial Code on December 1, 1955 (App. 7a-10a). The purpose of the affidavit was to have Judge Rabe F. Marsh, Jr. disqualified and removed, based upon his alleged bias and prejudice against her cause and her counsel and in favor of defendants and their attorneys with whom Judge Marsh's brother is associated (App. 1a-10). Nevertheless, Judge Marsh entered an Order on January 3, 1956, striking the affidavit (App. 10). By the time Judge Marsh acted upon Mrs. Behr's affidavit, he had also handed down other Orders favorable to the defendants (App. 7-8) with the result that the Notice of Appeal was attacked as untimely (App. 1-5). Although it was not untimely under the law, particularly the law of this Honorable Court to the effect that the affidavit was sufficient and Judge Marsh's removal should

have been held to be automatic as of the date the affidavit was filed (Petition for Rehearing pp. 3-7), nevertheless the court of appeals sustained Judge Marsh's action thereon by disregarding that part of the argument.

Subsequently, to wit, on August 6, 1956, District Judge Marsh in another action entered an Order (App. 21) disqualifying himself pursuant to Section 144 of the Judicial Code by reason of the affidavit (App. 17-20) of Paul Ginsburg, a party therein, who is Mrs. Behr's attorney herein. The said Order of disqualification of Judge Marsh conflicts with his Order (App. 10) herein striking the affidavit of Plaintiff, and the Order (App. 21) in the other action lends additional support to the affidavit of Plaintiff (App. 7a-10a) herein.

Shortly before the filing of the affidavit of Plaintiff, to wit, on November 16, 1955, Judge Marsh had handed down five Orders in favor of defendant Joseph H. Hirshhorn (App. 7-8), all of which are insupportable and untenable. In the said Orders Judge Marsh (1) granted defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Defendant arbitrarily and without legal justification, the said default being based upon failure to answer or file an appearance in accordance with the rules and applicable procedure; (2) granted Hirshhorn's Motion to Dismiss the Complaint for lack of jurisdiction over his person, after Hirshhorn had already submitted to the Court's jurisdiction by (a) filing a Motion to Dismiss Complaint after the expiration of the 20 days set forth in the notice to plead, (b) filing a Motion for Extension of Time to Answer Interrogatories, presented in open Court on April 27, 1955, which motion

certainly cannot be made without submitting to the Court's jurisdiction, (c) filing a Motion to Set Aside Entry of Default, all of which pleadings are signed by defendant Hirshhorn's attorneys without limitation of their authority to appear for him; (3) denied plaintiff's Motion Under Rule 37a to have Hirshhorn answer interrogatories which had been served upon him; (4) denied the plaintiff's Motion Under Rule 11 to strike certain allegations of Hirshhorn's Motion to Set Aside Entry of Default which were sham, false and scandalous; (5) denied plaintiff's Motion Under Rules 11 and 12 (f) to strike Hirshhorn's Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, as impertinent, misleading, scandalous, in bad faith, incompetent, immaterial and malicious.

Plaintiff's said motions to strike were renewed in the court of appeals in a Motion to Limit the Contents of the Printed Record and to Strike and Suppress Certain Original Papers, alleging that the principal contents of said documents falsify the terms of an arrangement between Mrs. Behr's Counsel and Hirshhorn's New York counsel, Benjamin Heffner, Esquire, wrongfully making it appear that counsel for plaintiff breached the arrangement (thus supporting Hirshhorn's "right" to file late) when the fact is that Heffner breached the arrangement and released counsel for plaintiff. Thus the falsification not only was damaging to plaintiff's counsel but also improperly influenced the courts below against plaintiff's cause. The record (1a-6a, 9a) supports plaintiff's contention that Hirshhorn misrepresented the said arrangement when his Motion to Set Aside Entry of Default contained: "Defendant Joseph H. Hirshhorn's tardiness of three days in filing his Motion to Dismiss

the herein complaint as to himself was based upon his good faith reliance on the verbal agreement between his New York counsel, Benjamin Heffner, Esquire, and plaintiff's counsel, Paul Ginsburg, Esquire, that defendant Joseph H. Hirshhorn would receive an extension of time to respond to the said complaint"; and Attorney Sherman T. Rock's affidavit attached thereto contained: "That Defendant Joseph H. Hirshhorn arranged through his New York counsel, Benjamin Heffner, Esquire, with Paul Ginsburg, Esquire, counsel for Plaintiff's Complaint, to receive an extension of time for responding to said complaint, and in good faith relied thereupon".

On April 27, 1955, in the course of argument Attorney Rock for Hirshhorn stated in his presentation to the court (Tr. p. 2) that "Mr. Heffner, Mr. Hirshhorn's counsel in New York City * * * explained that he had an arrangement with Mr. Ginsburg whereby we would be permitted to file some kind of answer or responsive pleading late"; and further (Tr. p. 3) that "In the meantime I had spoken to Mr. Ginsburg. He confirmed what Mr. Heffner told me about their arrangement to permit late filing. He mentioned at the same time that he had another arrangement with Mr. Heffner whereby our client was to cooperate in the taking of testimony either by deposition or by interrogatories, or some other method". At the same time Mr. Rock stated in open court that he received the aforesaid information from Mr. Heffner via long distance telephone from New York City on the morning of March 28th (Tr. p. 2).

The said arrangement to permit late filing was contingent upon Hirshhorn's answering plaintiff's depositions. When Hirshhorn's counsel failed to live up to the

agreement by refusing to answer plaintiff's interrogatories, plaintiff's counsel was admittedly released from the arrangement to permit late filing.

In view of the foregoing, it is quite evident that Attorney Rock had knowledge of the arrangements between Attorneys Heffner and Ginsburg before he filed Hirshhorn's Motion to Dismiss, and that Heffner was the first to breach; and that subsequently, with the said knowledge, Mr. Rock has referred only to that portion of the arrangements relating to late filing in order to make it appear wrongfully that the breach was caused in bad faith by counsel for plaintiff instead of by New York City counsel for defendant Hirshhorn as was the fact. Important record support for the contention of plaintiff's counsel is found in the affidavit of Daniel L. Tate (App. 5a-6a). The record contains no evidence to the contrary, but merely hearsay statements of the said Pittsburgh attorney for defendant Hirshhorn.

Hirshhorn's Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike under Rule 11 repeats and republishes the said matters complained of as set forth in Hirshhorn's Motion to Set Aside Entry of Default.

It was contended in the courts below that the striking of said two documents filed on behalf of defendant Hirshhorn for being false, impertinent, incompetent and scandalous would have rendered them a nullity and would have cleansed the record of any "basis" for dismissal of the action as to Hirshhorn. It was contended further that the refusal of the courts so to strike conflicted with the decision of the Court of Appeals (App. 22-23) at No. 11,499 in the case of *Paul Ginsburg v. Horace Stern,*

et al., wherein the Court of Appeals entered an order to strike and suppress two documents which are presumptively as well as assertedly true there being no denial of record and which are pertinent.

On behalf of the plaintiff it was contended that the action of her affidavit pursuant to Section 144, filed December 1, 1955, was automatic. Promptly thereafter, to wit, on December 7, 1955, her Motion to Reassign Cause (App. 11) was filed, having attached thereto a Motion for Reconsideration (App. 12) to have the district court reconsider, vacate and hear reargument upon Orders of Judge Marsh.

On December 10, 1955, a motion of defendants other than Hirshhorn to dismiss plaintiff's action was filed, and an Order (App. 11) was entered granting it on January 3, 1956, simply because plaintiff had failed to answer certain interrogatories while waiting to see if the Court would grant her Motion Under Rule 37a to compel defendants to answer her interrogatories first pursuant to her right to discovery as guaranteed by Rule 26a.

On January 13, 1956, Hon. Wallace S. Gourley, Chief District Judge, entered an Order (App. 14) denying plaintiff's motion to reassign the case to another member of the Court other than Hon. Rabe F. Marsh, Jr.

On January 25, 1956, a Motion for Reconsideration (App. 15) was filed for plaintiff, to have the Court reconsider, vacate and hear reargument upon Orders entered by Judge Marsh.

On January 26, 1956, "after due consideration", Judge Marsh entered an Order (App. 16) denying said Motion for Reconsideration.

On February 16, 1956, the Notice of Appeal (App. 16) was filed.

Hon. Rabe F. Marsh, Jr., in his Memorandum (App. 10) which accompanied the Order striking Mrs. Behr's affidavit admitted ". . . mistakes of law in decisions I have made in the past in various phases of this and of another action". Thus Judge Marsh has invited a reversal.

It is significant that Judge Marsh denied his bias and prejudice against the plaintiff's counsel long enough to preside over a total dismissal of plaintiff's action, during which time Judge Marsh brushed aside his denial of plaintiff's rights as mere "mistakes of law". Then, after said dismissal was accomplished, he admitted that all along he was biased and prejudiced against plaintiff's counsel, Paul Ginsburg, Esquire. Furthermore, Judge Marsh's said bias and prejudice is now a matter of Judicial Notice since October 8, 1956. On that day this Honorable Court, at No. 929 October Term, 1955, granted Paul Ginsburg's Motion for Leave to File Appendix to Petition for Rehearing and denied the respondent's Motion to Strike Paul Ginburg's Petition for Rehearing, both of which documents contained his allegations charging Judge Marsh with bias and prejudice against him. Thus the said charges of Paul Ginsburg, Esquire, against Hon. Rabe F. Marsh, Jr., have been given sanction by this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of appeals relating to the sufficiency and the effect of the affidavit of plaintiff filed pursuant to Section 144 of the Judicial Code is in conflict with applicable decisions of this Honorable Court which has held in the case of *Berger v. United States,* 255 U.S. 22, that such affidavits should be liberally construed and that the action of the affidavit is automatic. In said case the United States Supreme Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic". The said case laid down the test for determining the sufficiency of an affidavit of personal bias and prejudice, at page 33 as follows: "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants". The Court continued, page 35, as follows: "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular

case; of what concern to other parties to have him so preside? * * *"

In the case of *United States v. Shibley,* 112 F. Supp. 734 (1953), the court held, p. 748, that "The disqualification is automatic if the facts stated in the affidavit are legally sufficient".

In the case of *Allen v. duPont, et al.* (1948) 75 F. Supp. 546, the Court, p. 549, held: "The statute in question should be interpreted liberally. Certainly with its objectives no one can complain, least of all a judge who has any regard for the sanctity and the solemnity of his oath". A liberal construction of plaintiff's affidavit would show personal bias and prejudice not only against her but also in favor of defendants who are represented by attorneys with whom Judge Marsh's brother, Attorney Edward W. Marsh, is associated. (App. 2a-3a, 10a).

The applicable law of Pennsylvania which should also be considered is set forth in the Supreme Court case of *In Re Crawford's Estate,* 160A. 585, 307 Pa. 102. That case holds (p. 107) that there is no repugnance in any of the constitutional and statutory provisions (cited therein) for disqualification of judges; and that they may all stand as treating of different situations requiring a change of venue or the calling in of another judge to hear the case. It also held (pp. 107-8) that a challenge to a judge's qualifications because of prejudice and hostility toward an attorney brings the judge within the meaning of "unable to sit in any matter", and it is therefore within the scope of the Act of June 7, 1917, P.L. 363, Section 3.

Therefore, because the affidavit of plaintiff is sufficient and its action is automatic, the disqualification

of District Judge Rabe F. Marsh, Jr., should be held to be effective as of December 1, 1955, the date of filing of the affidavit. It necessarily follows that Judge Marsh was without jurisdiction to enter any Orders subsequent thereto, particularly his Order (App. 11) granting the motion of defendants other than Hirshhorn to dismiss the action. (Likewise Judge Gourley was without jurisdiction to enter his Orders by reason of the lack of reassignment of the case.) Also, it necessarily follows that the time for filing the Notice of Appeal from the Orders of November 16, 1955, was tolled by the filing of the affidavit on December 1, 1955.

2. The decision of the Court of Appeals in refusing to grant plaintiff's motions to strike and suppress is in conflict with the Federal Rules of Civil Procedure, particularly Rules 11 and 12(f), and the law applicable thereto. Had the Court of Appeals duly considered said motions, it should have granted them and thus rendered the two documents in question filed by defendant Hirshhorn a nullity. Then it would necessarily follow that defendant Hirshhorn would not have any basis for a dismissal of the action and he would not have any escape from the jurisdiction of the Court to which he actually submitted. Under the applicable law defendant Hirshhorn, aside from the foregoing contention, has submitted to the jurisdiction of the Court and does not have any basis for a dismissal.

3. Actually the Court of "Appeals" has unjustly denied Mrs. Behr her right of appeal, and it is respectfully submitted that this Honorable Court should restore that right of which she has been deprived. In support hereof the first two paragraphs of Mrs. Behr's Petition

for Rehearing in the Court of Appeals are reprinted as follows:

On May 18, 1956, the Opinion and Order of this Honorable Court were entered, pursuant to which the motions of the appellees to dismiss the appeal were granted and the appeal dismissed. The last sentence of said Opinion is as follows: "This conclusion makes it unnecessary to deal with a motion filed by the plaintiff to 'limit the contents of the appendix and so forth' ". An examination of said Opinion and Order does not at all disclose the fact that the words "and so forth" have been used to replace the words "and to Strike and Suppress Certain Original Papers", thus giving the mistaken impression that the Court naturally would not limit the contents of the appendix of a dismissed appeal, rather than the real fact that the Court would not first (or at all) pass upon plaintiff's motion to Strike and Suppress Certain Original Papers which should materially affect the Court's consideration of the motions to dismiss the appeal and cause their denial.

Had the Court first considered the plaintiff's said motion, it should have pursuant to the applicable law stricken and suppressed defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Default and his Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, which would cleanse the record and render them a nullity Then it would follow that the appellees' motions to dismiss this appeal would be insupportable and untenable. This Court's refusal so to strike and suppress creates a *conflict* with its decision handed down last year at appeal No. 11,499 in the case of *Paul Ginsburg, Appellant, v. Horace Stern, et al.;* and further may create an *im-*

pression that this Court will discriminatorily strike against but not for Paul Ginsburg, Esquire. The Supreme Court of the United States in the recent case of *In Re Murchison* (1955), 349 U. S. 133, held in its Opinion by Mr. Jusice Black (p. 136) that to perform its highest function in the best way "Justice must satisfy the appearance of Justice". In this connection it is further submitted that the Court overlooked or misapprehended the point that the Orders of the lower court which are the subject of this appeal, are products of bias rather than simply as Judge Marsh admitted in his Opinion, "* * * mistakes of law in decisions I have made in the past in various phases of this and of another action".

4. The decision of the Court of Appeals has violated Mrs. Behr's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States, by depriving her of her property rights in her shares of stock of Carbon Monoxide Eliminator Corporation, and of her *right to a day in court* in the district court where she is entitled to a trial by jury.

5. The discriminatory action of the Court of Appeals regarding the said motions to strike and suppress, and its complete indifference to the legal effect of her affidavit pursuant to Section 144, are tantamount to a denial of appeal as well as a sanctioning of the district court's departure from the accepted and usual course of judicial proceedings (including denial of plaintiff's right to discovery), so as to call for an exercise of this court's power of supervision pursuant to paragraph 1(b) of Rule 19.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,878

ANNE LIVINGSTON BEHR, *Appellant*

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN.

ON MOTIONS TO DISMISS APPEAL AND MOTION TO LIMIT CONTENTS OF APPENDIX, ETC.

Argued April 16, 1956
Before GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed May 18, 1956)

By GOODRICH, *Circuit Judge.*

From a judgment of dismissal entered by the trial judge in the Western District of Pennsylvania the plaintiff appeals. The defendants now move to dismiss the appeal on the ground that it was not timely taken, that the timeliness of the appeal is jurisdictional and that the

Court has no power therefore to proceed further in the case. FED. R. CIV. P. 73(a); *Raughley v. Pennsylvania Railroad,* 230 F.2d 387 (3d Cir. 1956); 4 MOORE, FEDERAL PRACTICE ¶ 73.09 [6] (2d ed. 1955).

There are several defendants. All of them are involved in the same set of facts except defendant Hirshhorn. This defendant was never served in Pennsylvania and upon motion it was ordered November 16, 1955, that the complaint as to Hirshhorn be dismissed on the ground that the court lacked jurisdiction over his person. The appeal from this dismissal was noted February 16, 1956. Unless there is something involved in the point plaintiff makes about the alleged disqualification of the judge for prejudice, the appeal from the dismissal of Hirshhorn is obviously untimely and requires no more discussion.

On this same November 16, 1955, the attorney for the plaintiff filed a petition to all the judges of the Western District of Pennsylvania to disqualify the Honorable Rabe F. Marsh, Jr. as trial judge. The list of docket entries does not show the time of day when this petition was filed, but since it comes later in the list of docket entries than the order dismissing Hirshhorn, we conclude that it was filed later than that order.[1]

On November 21 Chief Judge Gourley of the Western District of Pennsylvania filed an order refusing the petition to disqualify Judge Marsh and assigned the

---

1 Rule 79(a) of the Federal Rules of Civil Procedure provides that "All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted *chronologically* in the civil docket on the folio assigned to the action . . ." (emphasis supplied).

matter to him for disposition. Two days later Judge Marsh denied the petition to disqualify. On December 1 plaintiff, again seeking to have Judge Marsh disqualified, filed an affidavit of prejudice. 28 U.S.C. § 144 (1952). On December 7 plaintiff made a motion to Chief Judge Gourley to have the case assigned to another judge than Judge Marsh.

On December 10th defendants other than Hirshhorn filed a motion to dismiss on the ground that the plaintiff had failed to comply with certain orders of the court. This motion was answered by the plaintiff on December 14th. On January 3, 1956, Judge Marsh, after striking plaintiff's affidavit of prejudice from the record, granted the defendants' motion and dismissed the complaint.[2] Following this Chief Judge Gourley, on January 13, 1956, denied the motion to reassign the proceeding to another judge than Judge Marsh. On January 25th the plaintiff moved for reconsideration of adverse orders. On January 26th the motion was denied. The appeal was taken February 16th.

It will be noted, in this welter of dates, that the order dismissing the cause by Judge Marsh on January 3rd and the notice of appeal on February 16th (both 1956) are farther apart than the statutory time permitted. It will also be noticed that the motion as to Hirshhorn was acted upon prior to the several petitions to disqualify Judge Marsh.

It will also be noticed that Judge Marsh ruled on plaintiff's affidavit before he dismissed the complaint as

---

2 Again the order of the docket entries indicates the order in which these actions were taken. See note 1, *supra*.

to the defendants other than Hirshhorn. The plaintiff has cited us a good deal of authority which he says establishes the proposition that when an affidavit of prejudice is filed a judge's power to proceed with the case is ended. We do not need to go into all of the ramifications of this question. Suffice it to say that the mere filing of the affidavit does not automatically disqualify the judge. He has authority to decide whether the claim of bias is legally sufficient.[3] And having disposed of this claim, he is free to act in the case.[4]

There was, as outlined above, a motion for reconsideration of adverse orders filed January 25, 1956. Plaintiff argues that this motion for reconsideration tolls the time for appeal and that therefore the time did not start until January 26, 1956. If that is so, obviously a notice of appeal filed on February 16th is in plenty of time. But this question was settled against the plaintiff in our recent decision in *Raughley v. Pennsylvania Railroad,* 230 F.2d 387 (1956). The difference in opinion among

---

3 Price v. Johnston, 125 F.2d 806, 811 (9th Cir. 1942), *cert. denied,* 316 U.S. 677 (May 4, 1942); Eisler v. United States, 170 F.2d 273, 278 (D.C. Cir. 1948), *writ of cert. dismissed,* 338 U.S. 883 (1949); Taylor v. United States, 179 F.2d 640, 644 (9th Cir. 1950); United States v. Valenti, 120 F. Supp. 80, 83 (D.N.J. 1954).

4 Eisler v. United States, 170 F.2d 273, 278 (D.C. Cir. 1948), *writ of cert. dismissed,* 338 U.S. 883 (1949); United States v. Gilbert, 29 F. Supp. 507, 509 (S.D. Ohio 1939); Fieldcrest Dairies v. City of Chicago, 27 F. Supp. 258, 259 (N.D. Ill. 1939); United States v. Valenti, 120 F. Supp. 80, 84 (D.N.J. 1954). Judge Marsh did not have to wait for a formal ruling on the motion of December 7 to assign another judge. This motion was premised on the fallacious theory that the mere filing of the affidavit removed him from the case.

the members of the Court with regard to the necessity of a writing has nothing to do with the application of that decision to this situation. The case is in point. It settles the question adversely to the plaintiff. This conclusion makes it unnecessary to deal with a motion filed by the plaintiff to "limit the contents of the appendix and so forth."

The motion to dismiss the appeal as to all defendants will be granted.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order

Present:

GOODRICH, KALODNER and HASTIE, Circuit Judges.

Upon consideration of the motion by all of the appellees other than Joseph H. Hirshhorn, and the motion by Joseph H. Hirshhorn, one of the appellees, to dismiss the appeal in the above-entitled case; and of the answers thereto and of the memoranda in support of and in opposition to the motions; and after hearing;

It is ORDERED that the motions be, and they are hereby granted;

And it is further ORDERED that the appeal be, and it is hereby dismissed.

Attest:

IDA O. CRESKOFF
Clerk

May 18, 1956

Sur Petition for Rehearing

Present:

GOODRICH, KALODNER and HASTIE, Circuit Judges.

Afted due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT

Dated: June 19, 1956 GOODRICH

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANNE LIVINGSTON BEHR, Plaintiff,

v.

MINE SAFETY APPLIANCES COMPANY, a corporation of the State of Pennsylvania, CARBON MONOXIDE ELIMINATOR CORPORATION, a corporation of the State of Delaware, CATALYST RESEARCH CORPORATION, a corporation of the State of Maryland, GEORGE H. DEIKE, WILLIAM P. YANT, JOHN F. BEGGY, JOHN T. RYAN, JR., W. DENNING STEWART, POTTER BANK & TRUST CO., Executor of the Estate of HOWARD ZACHARIAS, Deceased, and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of JOHN T. RYAN, Deceased, and JOSEPH H. HIRSHHORN, Defendants.

Civil Action No. 12010

Memorandum and Order

MARSH, District Judge.

I find no merit in the arguments advanced by the plaintiff pertaining to the five motions between him and

the defendant Hirshhorn. It is plain that this court acquired no jurisdiction over the person of said defendant by the extraterritorial service in New York (see Rule 4 (f), Fed. R. Civ. P.), and, in my opinion, the said defendant or his counsel has done nothing which is effective to waive his right to contest the jurisdiction of this court and strike off the default judgment entered against him. Inasmuch as this court has no jurisdiction over the said defendant, the plaintiff's motion under Rule 37(a) to compel the answer to certain interrogatories will accordingly be denied. Further, we believe that neither defendant nor his counsel has done anything which may be termed sham, false, scandalous, malicious or in bad faith. Therefore, the motions to strike on those grounds will be dismissed.

An appropriate order will be entered.

ORDER OF COURT

AND NOW, to-wit, this 16th day of November, 1955, after due consideration, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the Motion of Defendant Joseph H. Hirshhorn filed May 13, 1955, to Set Aside Entry of Default as to said Defendant entered April 20, 1955, be and the same hereby is granted and the default is hereby set aside.

2. That the Motion of Defendant Joseph H. Hirshhorn filed March 31, 1955, to Dismiss the Complaint in the herein action as to said Defendant or in lieu thereof to quash the return of summons and set aside the service thereof upon him on the ground that this court lacks

jurisdiction over his person be and the same hereby is granted, and the said complaint is hereby dismissed as to said Defendant and the said return of summons and the service thereof is hereby quashed and set aside.

3. That the Motion of Plaintiff under Rule 37a, filed June 21, 1955, to order Defendant Joseph H. Hirshhorn to answer certain written interrogatories addressed to and served upon him as Defendant on April 11, 1955, and filed April 14, 1955, be and the same hereby is denied, and the said Defendant Joseph H. Hirshhorn, being no longer a Defendant by reason of Paragraphs 1 and 2 hereof, is under no obligation to answer said interrogatories in their present form.

4. That the Motion of Plaintiff filed May 18, 1955, under Federal Rule 11, to Strike certain allegations of Defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Default on the ground that said allegations were sham, false and scandalous be and the same hereby is denied.

5. That the Motion of Plaintiff filed May 24, 1955, under Federal Rules 11 and 12(f), to Strike Defendant Joseph H. Hirshhorn's Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike under Rule 11, filed May 16, 1955, as impertinent, misleading, scandalous, in bad faith, incompetent, immaterial and malicious be and the same hereby is denied.

(signed) RABE F. MARSH
Unted States District Judge

Memorandum and Order

MARSH, District Judge.

The plaintiff in this action filed an affidavit pursuant to 28 U.S.C. §144 (1952), alleging that she believes that I am "prejudiced and biased against her cause and her counsel; and that as a result she will be unable to have a fair trial of this case" unless I am removed and another judge substituted. The grounds are set forth in five numbered paragraphs.

It is well settled that if an affidavit of bias and prejudice, properly certified by affiant's counsel, contains allegations of fact, which, if true, would disqualify the judge from trying the case, the judge cannot inquire into the truth of the charges but must forthwith step aside. But the judge against whom the affidavit is filed has the power to pass upon its legal sufficiency. *Berger v. United States,* 255 U. S. 22 (1921).

An examination of this affidavit and the five paragraphs contained therein fails to disclose a single statement of fact tending to show that I entertain personal bias and prejudice against Mrs. Behr or in favor of any of the defendants. *Eisler v. United States,* 170 F. 2d 273 (D.C. Cir. 1948). Indeed, the affidavit fails to use the qualifying word "personal", which omission has been held to be fatal to its sufficiency. *Henry v. Speer,* 201 Fed. 869 (5th Cir. 1913).

The generalization or conclusion in the fifth paragraph that I would be biased in favor of the defendants, or some of them, which is based on the fact that my brother is employed by the law firm representing some of the defendants, is a far-fetched assumption concerning my state of mind, buttressed by not a single tangible indication of any personal bias or prejudice.

The first four paragraphs in the affidavit are clearly insufficient since they allege mistakes of law in decisions I have made in the past in various phases of this and of another action. In construing the statute, the Supreme Court said: "It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term." *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44 (1913); cited with approval in *Berger v. United States, supra.*

In my opinion, the allegations in the affidavit, considered severally and collectively, are legally insufficient to require my disqualification under the statute; and it is therefore my duty to remain in the case. *Eisler v. United States, supra,* 170 F. 2d at 278.

An order will be entered striking the affidavit.

ORDER OF COURT

AND NOW, to-wit, this 3rd day of January, 1956, upon due consideration, it is ordered that the affidavit of Anne Livingston Behr be and the same hereby is stricken from the record.

(signed) RABE F. MARSH
United States District Judge

Order

The motion of defendants other than Hirshhorn filed December 10, 1955 is granted and IT IS ORDERED that plaintiff's action be dismissed.

(signed) RABE F. MARSH
District Judge

Dated: January 3, 1956

Motion to Reassign Cause

Now, comes the plaintiff, Anne Livingston Behr, by her attorney, Paul Ginsburg, Esq., and moves that Hon. Wallace S. Gourley, Chief Judge of this Honorable Court, enter an Order reassigning to the above cause a Judge of this Honorable Court other than Hon. Rabe F. Marsh, Jr., who being previously assigned thereto has been removed by virtue of the Affidavit of Plaintiff filed December 1, 1955, pursuant to the Judicial Code (28 USCA Section 144); and setting argument of the attached Motion for Reconsideration upon the next Argument List.

S/ PAUL GINSBURG
Attorney for Plaintiff
550 Grant Street
Pittsburgh 19, Pa.

Dated: 7 December, 1955

Motion for Reconsideration

Now, comes the plaintiff, Anne Livingston Behr, by her attorney, Paul Ginsburg, Esq., and moves your Honorable Court to reconsider, vacate and hear reargument upon certain orders heretofore entered in the above cause by Hon. Rabe F. Marsh, Jr., now removed by virtue of the Affidavit of Plaintiff filed December 1, 1955, because plaintiff believes said Judge Marsh "is prejudiced and biased against her cause and her counsel", as follows: denying Plaintiff's Motion Under Rule 37(a) directed against defendant George H. Deike; granting Motion Under Rule 37(a) of defendant Mine Safety Appliances Company directed against plaintiff; denying plaintiff's Motion Under Rule 37(a) directed against defendant Joseph H. Hirshhorn; granting defendant Hirshhorn's Motion to Set Aside Entry of Default; granting defendant Hirshhorn's Motion to Dismiss Complaint; denying Motion to Strike Under Rule 11 certain allegations in defendant Hirshhorn's Motion to Set Aside Entry of Default; denying Motion to Strike Under Rules 11 and 12(f) the Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11; and refusing to consider the Affidavit of Daniel L. Tate in support of plaintiff's Entry of Default Against Defendant Hirshhorn, Motion Under Rule 37(a), Motion to Strike Under Rule 11, and Motion to Strike Under Rules 11 and 12(f), and to hear and consider his offered oral deposition in support thereof.

S/ PAUL GINSBURG
Attorney for Plaintiff
550 Grant Street
Pittsburgh 19, Pa.

Dated: 7 December, 1955

Memorandum Opinion

WALLACE S. GOURLEY, Chief Judge:

In this proceeding of November 16, 1955, Paul Ginsburg, Esq., counsel for the plaintiff, filed a petition addressed to "The Chief Judge and the Judges" of this court wherein he, as the petitioner, sought to have the Honorable Rabe F. Marsh, Jr., disqualified for bias and prejudice. On November 21, 1955, after careful consideration, I refused the petition on the ground that there is no authority in law for the Chief Judge or any other member of the court, severally or jointly, to so disqualify an associate judge. Accordingly, the matter was referred to the Honorable Rabe F. Marsh, Jr., for disposition in accordance with the provisions of the law. 28 USCA Section 144. On November 23, 1955, Judge Marsh refused the prayer of the petition on the grounds that the procedure which the petitioner sought to utilize was not in accordance with the provisions of law. On December 1, 1955, the plaintiff herself filed an affidavit pursuant to 28 U.S.C. Section 144 (1952), accompanied by a certificate of counsel, alleging that "the Honorable Rabe F. Marsh, Jr., is prejudiced and biased against her and her counsel, and that as a result she will be unable to have a fair trial of this case unless he is removed therefrom and another judge of this Honorable Court substituted for him. . . ." On January 3, 1956, the Honorable Rabe F. Marsh, Jr., filed a memorandum opinion and order in which it was adjudicated that under the provisions of 28 U.S.C. Section 144, the affidavit of prejudice was not legally sufficient to require his disqualification and, accordingly, was stricken.

On December 7, 1955, prior to the entry of the order striking the affidavit, counsel for the plaintiff presented to me, as Chief Judge of this court, the instant proceeding entitled "Motion to Reassign Cause" in which it was prayed that the above proceeding should be reassigned. This motion was based, inter alia, upon the fallacious premise that the Honorable Rabe F. Marsh, Jr., as a matter of law, was disqualified from hearing or determining any further matters relative to this action by the mere filing of the plaintiff's affidavit of bias and prejudice on December 1, 1955.

In view of the fact that my associate, Judge Marsh, decreed on January 3, 1956, that the affidavit of prejudice was not legally sufficient to require or justify the entry of an order of reassignment to another member of this court.

In addition thereto, I do not believe that any jurisdiction exists as Chief Judge of this court to interfere with the determination which has been entered by my associate, Judge Marsh.

In view of the foregoing, the motion to reassign the above cause of action is refused.

An appropriate Order is entered.

ORDER

AND NOW, this 13 day of January, 1956, the motion to reassign the above entitled proceeding to another member of this court other than the Honorable Rabe F. Marsh, Jr., will be and it hereby is denied.

WALLACE S. GOURLEY
Chief Judge

Motion for Reconsideration

Now, comes the plaintiff, Anne Livingston Behr, by her attorney, Paul Ginsburg, Esq., and moves your Honorable Court to reconsider, vacate and hear re-argument upon the following Orders heretofore entered in the above cause: (1) denying Plaintiff's Motion Under Rule 37(a) directed against defendant George H. Deike; (2) granting Motion Under Rule 37(a) of defendant Mine Safety Appliances Company directed against plaintiff; (3) denying plaintiff's Motion Under Rule 37(a) directed against defendant Joseph H. Hirshhorn; (4) granting defendant Hirshhorn's Motion to Set Aside Entry of Default; (5) granting defendant Hirshhorn's Motion to Dismiss Complaint; (6) granting motion of defendants other than Hirshhorn to dismiss plaintiff's action; (7) striking the Affidavit of Anne Livingston Behr from the record; (8) refusal to act upon plaintiff's Motion for Reconsideration dated 7 December 1955; (9) denying Motion to Strike Under Rule 11 certain allegations in defendant Hirshhorn's Motion to set Aside Entry of Default; (10) denying Motion to Strike Under Rules 11 and 12(f) the Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11; and (11) refusing to consider the Affidavit of Daniel L. Tate in support of plaintiff's Entry of Default Against Defendant Hirshhorn, Motion Under Rule 37(a), Motion to Strike Under Rule 11, and Motion to Strike Under Rules 11 and 12(f), and to hear and consider his offered oral deposition in support thereof.

S/ PAUL GINSBURG
Attorney for Plaintiff

Dated: 25 January, 1956

Order of Court

AND NOW, to-wit, this 26th day of January, 1956, after due consideration, it is ordered that the motion for reconsideration filed by the plaintiff with this Court at Civil Action No. 12010 on January 25, 1956, be and the same hereby is denied.

(signed) RABE F. MARSH
United States District Judge

Notice of Appeal

Notice is hereby given that Anne Livingston Behr, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order dated November 16, 1955 granting Defendant Hirshhorn's Motion to Set Aside Entry of Default; the Order dated November 16, 1955 granting Defendant Hirshhorn's Motion to Dismiss the Complaint and quashing and setting aside the return of summons and the service thereof; the Order dated January 3, 1956 granting the motion of defendant other than Hirshhorn to dismiss the action; the Order dated January 3, 1956 striking from the record the Affidavit of Plaintiff; and the Order dated January 26, 1956 denying plaintiff's Motion for Reconsideration of all the said Orders.

S/ PAUL GINSBURG
Attorney for Appellant
550 Grant Street
Pittsburgh 19, Pa.

Dated: 16 February, 1956.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Plaintiff
v.
BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, minors, BETTY K. GINSBURG and PAUL GINSBURG, Defendants
Civil No. 11521

Affidavit of Paul Ginsburg, Interpleaded Defendant, Pursuant to Section 144 of the Judicial Code

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me, a Notary Public in and for said County and State, personally appeared Paul Ginsburg, interpleaded defendant in the above cause, who being duly sworn according to law deposes and says that he in good faith believes that Judge Rabe F. Marsh, Jr. has a personal bias or prejudice against him; that the said Judge should be disqualified, and shall proceed no further in this case by reason of the provisions of the Judicial Code (28 U.S.C.A. Section 144) pursuant to which this affidavit is filed; and that in support hereof he respectfully submits:

1. Affiant is informed and believes that Judge Rabe F. Marsh, Jr. has made known to numerous persons, as well as to affiant, in and out of Court, that he has a per-

sonal bias, prejudice, hostility and antagonism against this affiant, and would not under any circumstances render a decision or judgment favorable to Attorney Paul Ginsburg (affiant) personally or to his clients and associates; and this disqualifying position of Judge Marsh has been quite obvious.

2. In this case Judge Marsh made insupportable and untenable decisions when he refused affiant's Motion for Summary Judgment; when he granted an injunction restraining affiant from proceeding with a conspiracy suit in a New York State Court against the Mutual Life Insurance Company of New York and others; when he granted the adverse claimant's Motion To Transfer The Cause To Arizona, at which time Judge Marsh stated in open Court that he could not see how said adverse claimant could possibly prove his "claim"; and again when he allowed compensation to the Guardian Ad Litem out of the interpleaded fund prior to the adjudication of the adverse claims. It is bad enough that these prejudicial decisions have put affiant to exhorbitant costs and expenses already during over three years of litigating on preliminary motions and can put affiant to much more exhorbitant costs and expenses for an indeterminable number of years to protect his personal and professional reputation as well as his property from illegal attacks by "shysters" and other conspirators. But it is worse that said prejudicial decisions have caused affiant the most severe, excessive and unwarranted damages that can occur to a reputable citizen like affiant, who is also a member of the Bar in good standing, caused primarily through the invidious inferences and innuendos planted in this record.

3. In another action wherein affiant is counsel for plaintiff before Judge Marsh in the above Court at No. 12010,—Anne Livingston Behr v. Mine Safety Appliances Company, a Pennsylvania corporation, George H. Deike, Joseph H. Hirshhorn, et al., Judge Marsh made numerous insupportable and untenable decisions, adversely affecting affiant personally and professionally. In said action Judge Marsh disregarded the applicable law when he denied plaintiff her right to discovery; when he granted Hirshhorn's Motion To Dismiss and his Motion To Set Aside Entry Of Default; when he refused to strike untrue, scandalous matters wilfully inserted in the record by Hirshhorn's attorneys which were and are libelous per se concerning affiant; and when he rendered other decisions therein favorable to the defendants other than Hirshhorn, represented by Reed, Smith, Shaw & McClay with which firm Judge Marsh's brother, Attorney Edward W. Marsh, is associated. The said plaintiff, Mrs. Behr, filed an affidavit pursuant to Section 144 of the Judicial Code to have Judge Marsh removed from the case. On January 3, 1956, Judge Marsh filed an Opinion in which he was trying to justify his Order striking Mrs. Behr's affidavit of prejudice. In the course of said Opinion, Judge Marsh admitted, ". . . mistakes of law in decisions I have made in the past in various phases of this and of another action". The other action referred to by Judge Marsh is this action, the instant case.

4. If the several above mentioned injustices were simply "mistakes of law" as claimed by Judge Marsh, he would have corrected them. However, he has not even attempted to do so nor does he intend to, although he has had all year to do so since his said admission of "mistakes". Therefore, the only fair and just conclusion is

that said injustices are products of personal prejudice and bias which the said Judge has against your affiant personally, as well as of his relationship with and favoritism toward the opposing parties and their attorneys.

s/ PAUL GINSBURG

Sworn to and subscribed to before me this 18th day of July, 1956.

s/ VERA FREDERICK
Notary Public

My commission expires February 2, 1957.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing affidavit is made and filed in good faith.

s/ PAUL GINSBURG
Counsel for Paul Ginsburg,
Interpleaded Defendant.

Order of Court

AND NOW, to-wit, this 6th day of August, 1956, after due consideration of the affidavit filed by Paul Ginsburg, the allegations therein that I am now or have been personally biased or prejudiced against him or in favor of any adverse party, and that I have made known to numerous persons, as well as to affiant, in and out of court, that I have a personal bias, prejudice, hostility and antagonism against him and would not under any circumstances render a decision or judgment favorable to him or to his clients and associates are denied.

IT IS ORDERED that pursuant to Title 28 U.S.C. §144 an order of disqualification be and the same hereby is entered in the above entitled matter, and the Clerk of Court is directed, pursuant to Rule 5 of the Rules of Court, to reassign this proceeding to another judge of this court for disposition.

(signed) RABE F. MARSH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAUL GINSBURG, Appellant
v.
HORACE STERN and PATRCK N. BOLSINGER
No. 11,499

Present: MARIS, GOODRICH and STALEY, *Circuit Judges*

Order

Upon consideration of the motion and supporting memorandum filed by the appellees to limit the contents of the printed record and to impound certain original papers in the above entitled case, and of the appellant's answer thereto,

It is ORDERED that neither of the parties shall print in his or their brief or in any appendix thereto or otherwise either (1) the exhibit to the complaint or any of its contents, except a statement to the effect that the said exhibit is a petition addressed to the Supreme Court of Pennsylvania under Rule 17 (d) of said court seeking disciplinary action against a judge of the Court of Common Pleas of Allegheny County, the fifteen members of the Committee on Offenses of the latter court and four individual members of the bar of said court, (2) the brief of the plaintiff in the court below which is listed as Document No. 18 on the record, or (3) any portion of either of said documents. The parties may however, in their briefs or in oral argument request the

court to examine the said documents in its files and upon such request the court will do so, the rule requiring such matters to be included in the appellant's appendix for the use of the Judges being expressly waived in this case.

It is further ORDERED that said brief and said exhibit to the complaint, together with any other papers hereafter filed in this proceeding which disclose the scandalous matter in said exhibit and brief, shall be impounded by the clerk and made available for inspection only upon the order of this Court.

BY THE COURT,

MARIS
Circuit Judge

January 4 1955

No. 512

OCT 16 1956

JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 11,878

ANNE LIVINGSTON BEHR, Appellant,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN.

Appeal From Orders of the United States District Court for the Western District of Pennsylvania at No. 12010, Denying Plaintiff's Motions to Strike, Striking the Affidavit of Plaintiff and Granting Defendants' Motions to Dismiss.

PETITION FOR REHEARING AND APPENDIX.

PAUL GINSBURG
Counsel for Appellant-Petitioner

550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

PETITION FOR REHEARING

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Anne Livingston Behr, appellant, respectfully represents:

1. On May 18, 1956, the Opinion and Order of this Honorable Court were entered, pursuant to which the motions of the appellees to dismiss the appeal were granted and the appeal dismissed. The last sentence of said Opinion is as follows: "This conclusion makes it unnecessary to deal with a motion filed by the plaintiff to 'limit the contents of the appendix and so forth' ". An examination of said Opinion and Order does not at all disclose the fact that the words "and so forth" have been used to replace the words "and to Strike and Suppress Certain Original Papers", thus giving the mistaken impression that the Court naturally would not limit the contents of the appendix of a dismissed appeal, rather than the real fact that the Court would not first (or at all) pass upon plaintiff's motion to Strike and Suppress Certain Original Papers which should materially affect the Court's consideration of the motions to dismiss the appeal and cause their denial.

2. Had the Court first considered the plaintiff's said motion, it should have pursuant to the applicable law stricken and suppressed defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Default and his Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, which would cleanse the record and render them a nullity. Then it would follow that the appellees' motions to dismiss this appeal would be insupportable and untenable. This

Court's refusal so to strike and suppress creates a *conflict* with its decision handed down last year at appeal No. 11,499 in the case of *Paul Ginsburg, Appellant, v. Horace Stern, et al.;* and further may create an *impression* that this Court will discriminatorily strike against but not for Paul Ginsburg, Esquire. The Supreme Court of the United States in the recent case of *In Re Murchison* (1955), 349 U. S. 133, held in its Opinion by Mr. Justice Black (p. 136) that to perform its highest function in the best way "Justice must satisfy the appearance of Justice". In this connection it is further submitted that the Court overlooked or misapprehended the point that the Orders of the lower court which are the subject of this appeal, are products of bias rather than simply as Judge Marsh admitted in his Opinion, "* * * mistakes of law in decisions I have made in the past in various phases of this and of another action".

3. Furthermore, the Court erred in ignoring the following paragraph contained in appellant's memorandum, action on which should render Hirshhorn's motion to dismiss the appeal a nullity:

> The objectionable matters hereinabove referred to which are the subject of the instant motion to strike and suppress were entirely unnecessary, because prior to the publishing thereof defendant Hirshhorn had already waived his right to object to the Court's jurisdiction over him. Hirshhorn had already submitted to the Court's jurisdiction *inter alia* by his (a) filing a Motion to Dismiss Complaint as to Defendant, Joseph H. Hirshhorn, after the expiration of the 20 days set forth in the Notice to

plead, to-wit, on March 31, 1955; (b) filing a Motion for Extension of Time to Answer Interrogatories dated April 13, 1955, and presented in Open Court on April 27, 1955; which motion certainly cannot be made without submitting to the Court's jurisdiction; (c) filing a Motion to Set Aside Entry of Default dated May 11, 1955, on May 13, 1955; all of which pleadings are signed by Defendant Hirshhorn's attorneys without limitation of their authority to appear for him.

4. The Court overlooked or misapprehended the point that plaintiff's said Motion to Strike and Suppress was not denied by the appellees other than Hirshhorn and that, therefore, its allegations must be taken as admitted to be true by them and binding upon them.

5. The Court, particularly Judge Kalodner, erred in applying herein its decision in the case of *Raughley v. Pennsylvania Railroad,* 230 F2d 387 (3rd Cir. 1956), Judge Kalodner dissenting therein, because *inter alia* this record has the distinguishing feature of containing an Affidavit of Plaintiff (App. 7a-10a) filed pursuant to 28 U.S.C.A. Section 144, which provides: "Whenever a party to any proceeding in a district court *makes and files* a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein,* but *another judge shall* be assigned to hear such proceeding" (Italics supplied).

The filing of said affidavit automatically disqualified Judge Marsh and tolled the running of time for appeal. In the said dissent of Judge Kalodner (p. 393) he stated,

"* * * the Rules do not specifically deal with the subject of reconsideration of summary judgments under Rule 12(c). That being so there is every reason why appellate courts should refrain from calling into play 'unwritten' Rules which would operate to deprive a district court of its inherent discretion to reconsider, when the ends of justice and efficient judicial administration so require, summary judgments of the kind here involved". Therefore, so far as plaintiff's Motions for Reconsideration are concerned, which were duly considered in the lower court, the court should have applied the principle of said opinion of Judge Kalodner in considering the time for appeal and in this case *a fortiori* in view of plaintiff's affidavit. It is further submitted that in this regard the Court overlooked, and erred in not applying the law set forth in its recent (1955) decision in the case of *Kelly v. Pennsylvania Railroad Co.,* 3 Cir., 228 F 2d 727, in which it was held that reconsideration is simply a request that the Court reconsider its action upon the original motion; and, if granted, the original motion is heard anew on the original papers just as though never previously heard.

6. The Court erred in refusing to review and reverse Judge Marsh's Order striking the said Affidavit of Plaintiff, which was entered at the same (delayed) time as his Order dismissing the complaint on motion of Reed, Smith, Shaw & McClay, which Order was included in the notice of appeal. In the light of the applicable law, a review of said Affidavit of Plaintiff (App. 7a-10a) which was filed promptly after dismissal of Petition To Disqualify Hon. Rabe F. Marsh, Jr., (App. 1a-6a), should result in an Opinion that it was legally sufficient and the Order striking it should be vacated. Such review would

reveal additional evidence of the bias of Judge Marsh in that he gave an unfair, unjust, insupportable advantage over the widow Behr to Joseph H. Hirshhorn who admittedly was "twice convicted for violation of the Foreign Exchange Laws of Canada and was then under investigation by the Attorney General of the State of New York in relation to certain dealings as promoter of the American-Canadian Uranium Co., Ltd." (App. 7a-8a); and that said advantage *ipso facto* inured to the benefit of Reed, Smith, Shaw & McClay with whom Judge Marsh's brother, Edward W. Marsh, Esquire, was and is associated (App. 3a, 10a).

7. In connection with plaintiff's claim that Judge Marsh's refusal to permit her to intervene in the prior Hirshhorn suit was untenable, this Court should have considered the recent (1956) Opinion of Bicks, D. J., in the case of *Breswick & Co. and Myron Neisloss, as stockholders of Allegheny Corporation and on behalf of themselves and all other stockholders similarly situated, Plaintiffs, v. O. Henry Briggs, Clint W. Murchison, Sid W. Richardson, John D. Murchison, Clint W. Murchison, Jr., Robert R. Young, Allegheny Corporation, et al., Defendants,* U. S. D. Ct., S. D. N. Y., 138 F. S. 747, wherein the Court held (p. 750): "Denial of the application (to intervene) will be prejudicial, indeed well nigh fatal, to the plaintiffs. Granting the same will sustain vitality in a suit which might otherwise come to an end without a determination on the merits. If that constitutes prejudice to the defendants, the Court cannot take cognizance thereof." What an unusually courageous decision for the Court in New York to make against some of the wealthiest men in the world!

8. The Court's refusal to uphold plaintiff's contention that section 144 of the Judicial Code should be liberally construed and all averments of her affidavit (App. 7a-10a) must be taken as undeniably true by Judge Marsh and that, therefore, said affidavit is legally sufficient, unlawfully laid the basis for this Court's Order of dismissal which is in *conflict* with the law as laid down by the United States Supreme Court in the case of *Berger v. United States,* 255 U. S. 22 (1921), wherein the Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic".

9. In view of the preceding allegation, it is respectfully submitted that the Court overlooked or misapprehended the following *inter alia,* from appellant's Memorandum In Opposition To Motions To Dismiss Appeal:

> In the case of *Allen v. duPont, et al.* (1948) 75 F. Supp. 546, the Court, p. 549, held: "The statute in question should be interpreted liberally. Certainly with its objectives no one can complain, least of all a judge who has any regard for the sanctity and the solemnity of his oath". A liberal construction of plaintiff's affidavit would show personal bias and prejudice not only against her but also in favor of defendants who are represented by attorneys with whom Judge Marsh's brother, Attorney Edward W. Marsh, is associated.
>
> *Furthermore, the action of the affidavit of disqualification is automatic.* In the case of *United States v. Shibley* (1953), 112 F. Supp. 734, the Court held, p. 748, that "The disqualification is

automatic if the facts stated in the affidavit are legally sufficient". In the case of *Berger v. United States,* 255 U.S. 22 (1921), the United Statess Supreme Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic". The said case laid down the test for determining the sufficiency of an affidavit of personal bias and prejudice, at page 33, as follows: "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants". The Court continued, page 35, as follows: "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? * * *"

10. In view of the foregoing, none of the cases cited in support of the Order of dismissal is pertinent or applicable herein.

11. The Court's refusal to grant the appellant's Motion To Strike And Suppress, to vacate Judge Marsh's Order striking the Affidavit of Plaintiff, and to deny appellees' motions to dismiss the appeal, constitutes a violation and deprivation of the federal rights of appellant-petitioner and her counsel as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Wherefore, petitioner prays that this Honorable Court grant a rehearing.

PAUL GINSBURG
Counsel for Appellant-Petitioner.

AFFIDAVIT AND CERTIFICATE OF COUNSEL.

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Before me, a Notary Public in and for said county and state, personallly appeared Paul Ginsburg who, being duly sworn according to law, deposes and says that he is counsel for the appellant-petitioner, that he has knowledge of the facts contained in the foregoing Petition For Rehearing and that the facts set forth therein are true and correct; and that the said Petition is filed in good faith and not for delay.

PAUL GINSBURG

Sworn to and subscribed before me this 28th day of May, 1956.

D. EUGENE SHAW
[SEAL] Notary Public.

My commission expires February 2, 1957.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANNE LIVINGSTON BEHR, Plaintiff
v.
MINE SAFETY APPLIANCES COMPANY, et al., Defendants
Civil Action No. 12010

Petition to Disqualify Hon. Rabe F. Marsh, Jr.

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Paul Ginsburg, attorney for plaintiff, respectfully represents:

1. On November 15, 1955, arguments were heard before Hon. Rabe F. Marsh, Jr. in the above action concerning various motions between plaintiff and defendant Joseph H. Hirshhorn, and plaintiff and defendants other than Hirshhorn.

2. In the course of said arguments a most important issue was the terms of an agreement between petitioner and Benjamin Heffner, New York attorney for defendant Hirshhorn. Until after argument thereon, petitioner had no reason to believe that his position thereon would require any further support as the opposing contention is not at all adequately supported, and is contradicted by the record. However, after argument on November 15, 1955, petitioner secured the affidavit of Daniel L. Tate in support of Plaintiff's Entry of Default Against Defendant Hirshhorn, Motion Under

Rule 37a, Motion to Strike Under Rule 11, and a Motion to Strike Under Rules 11 and 12(f), and filed it the same day with Notice to opposing counsel that it would be presented at 10:00 o'clock A.M. on November 16, 1955, to Hon. Rabe F. Marsh, Jr., in Court Room No. 1, when and where said Daniel L. Tate would be present as a going witness to give his oral deposition in support of his affidavit and be available for cross-examination. A copy of the said Affidavit of Daniel L. Tate, together with the said Notice, is attached hereto, made part hereof, and marked Exhibit "A".

3. The reason for petitioner's securing the Tate Affidavit and presenting it hurriedly was his observing a continuance of Judge Marsh's prejudice towards him at the argument. Throughout the course of this litigation, and other litigation, Judge Marsh's prejudice and his bias against petitioner has been most damaging and harmful to his clients as well as himself. Judge Marsh's prejudgments have been evidenced in previous experiences and Court Orders.

4. On November 16, 1955, petitioner appeared before Judge Marsh, accompanied by said Daniel L. Tate, for the above stated purposes, but the Judge refused to let Mr. Tate be heard then or at any other future time. Present for Defendant Hirshhorn was Attorney Sherman T. Rock who has been reinstated as, and is a member of the firm of Paul, Lawrence & Rock. Judge Marsh as usual permitted Attorney Rock to act unprofessionally and make false, slanderous and other unsupportable statements for the record concerning your petitioner. Similarly on the preceding day Judge Marsh permitted Attorney Paul E. Hutchinson of Reed, Smith, Shaw &

McClay to make offensive, self-serving statements for the record which are contradicted by prior records. Reed, Smith, Shaw & McClay represent all defendants other than Hirshhorn. During the early years of the Hirshhorn suit Attorney Sherman T. Rock was associated with Reed, Smith, Shaw & McClay. During the entire course of the foregoing litigation Judge Marsh's brother, Edward W. Marsh, Esquire, has been associated with Reed, Smith, Shaw & McClay.

5. In the course of said proceedings on November 16, 1955, it was disclosed to petitioner for the first time that Judge Marsh had ex parte authorized Attorney Sherman T. Rock to draft Orders of Court for Judge Marsh to sign, granting all of Hirshhorn's Motions and denying all of your petitioner's motions.

6. On prior occasions your petitioner, with restraint, refrained from seeking Judge Marsh's disqualification, but now represents that in the interest of justice it must be accomplished.

7. A serious doubt is hereby raised as to whether or not Judge Marsh has violated Canons 10, 11, 13, 33, 36 of the Canons of Judicial Ethics.

8. Another Judge of this Honorable Court should be substituted for Judge Marsh in the above action, and the substituted Judge should review the record and the Orders thereon and also conduct a Hearing to determine the future conduct of the case, all pending Orders in the meantime being stayed.

WHEREFORE, petitioner prays that this Honorable Court enter an Order substituting another Judge for Hon. Rabe F. Marsh, Jr., in the above action; that the

said substituted Judge, after examining the record and the Orders thereon, conduct an appropriate Hearing to determine the effect of the said prejudice against petitioner upon this case and, in the meantime, stay all pending Orders and proceedings.

s/ PAUL GINSBURG
Petitioner

AFFIDAVIT

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me a Notary Public in and for said County and State personally appeared Paul Ginsburg, who, being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct.

s/ PAUL GINSBURG

Sworn to and subscribed before me this 16th day of November, 1955.

s/ BINA B. ZEIDMAN
[SEAL] Notary Public
Pittsburgh, Allegheny County

My commission expires February 5, 1959.

EXHIBIT "A"

AFFIDAVIT OF DANIEL L. TATE

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me a Notary Public in and for said County and State personally appeared DANIEL L. TATE, who, being duly sworn according to law deposes and says that he is a resident of Hudson, Ohio; that his occupation is Publisher's Representative for Life magazine; that in the course of his employment he often makes business trips to Pittsburgh, Pennsylvania where he stays at the Carlton House; that during the month of March 1955 he was registered in Room 720 at Carlton House from the 14th through the 18th; that on or about the 18th of March, 1955 he happened to be in Suite 1635 permanently occupied by Attorney Paul Ginsburg, where and when a friendly discussion took place between Attorney Ginsburg and himself; that in the course of the said discussion a long distance phone call apparently from New York City, from one who represented himself to be an attorney for Joseph H. Hirshhorn, came through for Attorney Paul Ginsburg; that it was obvious to him throughout the telephone conversation that the attorney from New York was seeking an extension of time to file a pleading for Mr. Hirshhorn in certain litigation in which Attorney Ginsburg represented the plaintiff against the said Hirshhorn; that Attorney Ginsburg seemed quite willing to oblige the party on the other end of the line in permitting him to have an extension of time if the said party would agree to have his client, Mr. Hirshhorn answer interrogatories for the plaintiff, Mr. Ginsburg's client; that it was obvious from the

conversation on Ginsburg's end of the line that agreement had been reached whereby Hirshhorn's attorney would be permitted to file a pleading late and in consideration thereof secure for Mr. Ginsburg's client answers to interrogatories from Hirshhorn; that after the arrangement had been agreed upon and the telephone conversation ended, Attorney Ginsburg seemed quite elated, and upon inquiry his elation was attributed to the agreement between the one representing Hirshhorn that he would secure the answers to plaintiff's interrogatories for Attorney Ginsburg; and that one reason in particular why he recalls the foregoing conversation is that Mr. Ginsburg and he had discussed some of Attorney Ginsburg's litigation on previous occasions and that he had just finished informing him of how fortunate Ginsburg felt on behalf of his client in the above case in having secured personal service of the complaint upon Mr. Hirshhorn in New York City through the U. S. Marshal.

DANIEL L. TATE

Sworn to and subscribed before me this 15th day of November, 1955.

BINA B. ZEIDMAN
Notary Public
Pittsburgh, Allegheny County

[SEAL]

My commission expires February 5, 1959.

Affidavit of Plaintiff.

State of New York
County of New York } ss.:
City of New York

Before me, a Notary Public in and for said City and County and State, personally appeared Anne Livingston Behr, plaintiff above named, who being duly sworn according to law deposes and says that she believes the Honorable Rabe F. Marsh, Jr., is prejudiced and biased against her cause and her counsel; and that as a result she will be unable to have a fair trial of this case unless he is removed therefrom and another judge of this Honorable Court substituted for him; and that accordingly she is filing this affidavit pursuant to the Judicial Code (28 USCA Section 144); and that in support hereof she respectfully submits:

1. Judge Marsh has denied plaintiff her right to discovery as guaranteed by Rule 26(a) of the Rules of Civil Procedure by ordering her to answer interrogatories of a defendant before requiring defendant first to answer her interrogatories.

2. In the prior proceeding known as the Hirshhorn suit, Judge Marsh denied plaintiff her right to intervene as a party plaintiff therein, holding that her interests were adequately represented by Joseph H. Hirshhorn, the original plaintiff therein and a named defendant herein, although her undenied allegations were that Hirshhorn was not in possession of all necessary and pertinent information to prosecute the case adequately or to negotiate a fair settlement; and that Hirshhorn had been twice convicted for violation of the Foreign

Exchange Laws of Canada and was then under investigation by the Attorney General of the State of New York in relation to certain dealings as promoter of the American-Canadian Uranium Co., Ltd.; and she also alleged that she was informed and believed that Hirshhorn was attempting to negotiate a settlement of that case which would be prejudicial to her. When plaintiff appealed Judge Marsh's refusal to permit her to intervene, Judge Marsh refused to file an Opinion, which put her in an unfair and difficult position before the Court of Appeals. The record in the instant case now shows that in the Hirshhorn suit, Joseph H. Hirshhorn was actually interested in both sides of the case as he was not only a stockholder of Carbon Monoxide Eliminator Corporation, but also was a stockholder of Mine Safety Appliances Company, the principal defendant; and further that promptly after Hirshhorn had lost that case, he sold all of his shares of stock of Carbon Monoxide Eliminator Corporation to defendant Mine Safety Appliances Company at a price above the market value without disclosing to plaintiff or other minority stockholders (whom he claimed to be so adequately representing) that he was negotiating the sale. Although Hirshhorn claimed that the Carbon Monoxide Eliminator Corporation stock was really worth over one hundred dollars per share, its current market value is less than one dollar per share.

3. After Hirshhorn was served personally by the U. S. Marshal with the Complaint, Summons and Notice to plead, he moved Judge Marsh to dismiss this case as to him for lack of jurisdiction. Although the motion was filed too late under the rules and Hirshhorn through his attorneys took steps which constituted submission to the Court's jurisdiction, nevertheless Judge Marsh

granted the Motion to Dismiss and a Motion to Set Aside Entry of Default against Hirshhorn. Furthermore, Judge Marsh denied plaintiff's Motion Under Rule 37(a) to compel Hirshhorn to answer interrogatories while he was a defendant, being fully informed and aware that Hirshhorn's testimony otherwise may never be available because *inter alia* he plans to move and spend most of his time out of the United States.

4. In the course of Hirshhorn's activity herein, his Pittsburgh attorneys put in issue impertinently and incompetently untrue assertions relating to an agreement which was partly written and partly oral between plaintiff's attorney and Hirshhorn's New York attorney, Benjamin Heffner. Plaintiff's attorney, Paul Ginsburg, Esquire, had no reason to believe that Judge Marsh would accept as true the hearsay statements of Hirshhorn's Pittsburgh attorneys rather than the allegations of Attorney Ginsburg who was a party to the agreement, and so Attorney Ginsburg did not attempt to support his allegations prior to November 15, 1955, the day set for arguments. However, promptly thereafter, on the same day Attorney Ginsburg filed the Affidavit of Daniel L. Tate in support of Plaintiff's Entry of Default against Defendant Hirshhorn, Motion Under Rule 37(a), and Motions to Strike Under Rules 11 and 12(f). Judge Marsh that day refused to strike the untrue, scandalous assertions of Hirshhorn's attorneys, thus unduly and unjustly reflecting upon plaintiff's attorney; and the following day refused to hear said Daniel L. Tate or given any consideration to his affidavit.

5. Judge Marsh's dismissal of the Complaint as to Hirshhorn and his refusal to compel him to answer

plaintiff's interrogatories have unfairly hurt plaintiff's cause, and benefited the defendants other than Hirshhorn, all of whom are represented by Reed, Smith, Shaw & McClay with which firm Judge Marsh's brother, Edward W. Marsh, Esquire, is associated.

s/ ANNE LIVINGSTON BEHR

Sworn to and subscribed before me this 29 day of November, 1955.

[SEAL] Notary Public

Certificate of Counsel.

I hereby certify that the foregoing affidavit is filed in good faith.

s/ PAUL GINSBURG
Attorney for Plaintiff
550 Grant Street
Pittsburgh 19, Pa.

FILED
NOV 10 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS OTHER THAN JOSEPH H. HIRSHHORN IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PAUL E. HUTCHINSON
GILBERT T. HELWIG
REED, SMITH, SHAW & MCCLAY
Counsel for Respondents

747 Union Trust Building
Pittsburgh, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Statement	3
Argument	6
I. Petitioner's appeal was untimely	6
II. No conflict or other basis for review on certiorari is presented	8

CITATIONS

Berger v. United States, 225 U. S. 22	8
Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 121, 81 L. Ed. 557	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, et al., Respondents.

BRIEF FOR RESPONDENTS OTHER THAN JOSEPH H. HIRSHHORN IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals dismissing plaintiff's appeal is reported at 233 F2d 371 and appears in Petitioner's App. pp. 1-5.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where an order of the District Court dismissing an action was entered on January 3, 1956, and notice of appeal therefrom was not filed until February 13, 1956, is such an appeal timely under 28 U.S.C., Section 2107, of the United States Court and Rule 73(b) of the Federal Rules of Civil Procedure?

2. Is the period for appeal from such order tolled or extended by the filing and denial during the appeal period of a motion for reconsideration?

STATUTE INVOLVED

The case involves the provisions of Section 2107 of Title 28 of the United States Code:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> "In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> "In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from if it is a final decision, and within fifteen days after its entry if it is an introductory decree.

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

"This section shall not apply to bankruptcy matters or other proceedings under Title 11. As amended May 24, 1949, c. 139 §§ 107, 108, 63 Stat. 104."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Western District of Pennsylvania on February 23, 1954, by the filing of a complaint by the petitioner herein. On March 25, 1954 all of the named defendants, other than Joseph H. Hirshhorn, filed an answer, and concurrently, filed and served interrogatories directed to the plaintiff.

On April 23, 1954, said defendants filed a motion under Rule 37 (a) of the Rules of Civil Procedure seeking an order to compel the plaintiff in said action to file proper answers to said interrogatories.

On June 28, 1955, after various procedural delays, an order was entered directing the plaintiff to answer certain of said interrogatories within fifteen (15) days. Plaintiff failed to file such answers, but on the fifteenth day following entry of such order filed a motion to set aside and vacate the order requiring the filing of such answers. On November 16, 1955, after hearing, plaintiff's motion to vacate and set aside the order requiring her

to answer was dismissed, and plaintiff was again ordered to answer said interrogatories within fifteen (15) days.

On December 1, 1955, the date on which plaintiff's answers to said interrogatories were due, plaintiff filed an affidavit of prejudice under Section 144 of the Judicial Code directed against Honorable Rabe F. Marsh by whom all motions and hearings were heard and all orders entered in said proceeding were made. No answers were filed to defendants' said interrogatories.

On December 10, 1955, said defendants filed a motion to dismiss the complaint because of plaintiff's failure to file answers to its interrogatories, despite the orders of court and the provisions of the Rules of Civil Procedure.

On January 3, 1956, the District Judge Rabe F. Marsh, before whom the matter was pending, entered a memorandum and order declaring the affidavit of prejudice filed pursuant to Section 144 of Title 28 to be insufficient to require his disqualification and striking same. (App. p. 10) Thereafter, on the same date, January 3, 1956, he entered an order granting defendants' motion to dismiss plaintiff's action. (App. p. 11)

On January 25, 1956, plaintiff filed a motion for the reconsideration by the Court of a number of prior orders entered in the action, including the order declaring the affidavit of prejudice to be insufficient and the order granting said defendants' motion to dismiss. (App. p. 15) On the following day, January 26, 1956, the motion for reconsideration was denied. (App. p. 16)

On February 16, 1956, plaintiff filed notice of appeal to the United States Court of Appeals for the Third Circuit, (App. p. 16) indicating an intention to appeal,

inter alia, from the order of January 3, 1956, granting the motion of the defendants other than Hirshhorn to dismiss the action, and from the order dated January 26, 1956, denying Plaintiff's Motion for Reconsideration.

On April 4, 1956, the defendants, other than Hirshhorn, filed with the United States Court of Appeals for the Third Circuit a motion to dismiss plaintiff's appeal, on the grounds that it was untimely insofar as it related to the order of January 3, 1956 *dismissing plaintiff's action,* and that the order of January 26, 1956, denying plaintiff's motion for reconsideration of said orders was itself a nonappealable order.

Defendants' motion to dismiss plaintiff's appeal was granted by the Court of Appeals by order entered May 18, 1956, (App. p. 5) and it is this action which petitioner seeks to have reviewed by this Court on certiorari.

ARGUMENT

I. Petitioner's Appeal Was Untimely.

An appeal from a final order or judgment of the District Court must be taken within the time limitation provided by 28 U.S.C., Section 2107, unless (1) the running of the time for appeal is tolled or extended as provided in Rule 73 of the Rules of Civil Procedure, or (2) some special circumstance exists which makes the statute inapplicable.

Since the petitioner in the instant case did not file a notice of appeal from the order of the District Court entered January 3, 1956, until February 16, 1956, it is obvious that she has failed to meet the statutory requirements and that her appeal is untimely unless some other basis for extension of the appeal period is shown.

Petitioner does not present in her "Reasons for Granting the Writ" the occurrence of any event or circumstance which tolled the appeal time from the orders of January 3, 1956, nor can petitioner contend that the order of the District Court entered on January 26, 1956 denying her motion for reconsideration, either tolled the period of appeal or was itself an appealable order. That an order refusing a motion for rehearing is not an appealable order is well established in *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, 81 L. Ed. 557, in which your Honorable Court said in part p. 137, as follows:

> "The granting of a re-hearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated

party who applies for a rehearing and does not appeal from the judment or decree within the time limitation for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

Petitioner's request that the order of the Court of Appeals denying her appeal as untimely filed should be reviewed by your Honorable Court on certiorari appears to rest on her contention that the District Judge lacked jurisdiction to make the order appealed from. This is the same proposition which petitioner presented in the Court of Appeals and which the Court of Appeals rejected. It obviously goes to the *merits* and not to the timeliness of her appeal and we are not concerned with arguments which petitioner might have raised on appeal if she had perfected an appeal. In any event petitioner's contention that the District Judge lacked jurisdiction, presents no basis for the review of the order of the Court of Appeals dismissing her appeal as untimely. Such order must stand unless it is shown to be in conflict with other applicable decisions of your Honorable Court or otherwise of such character that it calls for the exercise of the power of supervision vested in your Honorable Court.

No such showing has been made.

II. No Conflict or Other Basis for Review on Certiorari Is Presented.

The defendants here involved moved to dismiss petitioner's appeal from an order of the District Court dismissing her action because the said appeal was untimely on its face. The Court of Appeals granted defendants' motion and held the appeal to be untimely.

The only relevant reason assigned by the petitioner for the granting of review on Writ of Certiorari is that the decision of the Court of Appeals is in conflict with an applicable decision of this Honorable Court in the case of *Berger v. United States,* 225 U.S. 22. (Pet's. Brief, p. 12)

Petitioner asserts that such alleged conflict is evidenced by the refusal of the Court of Appeals to hold that the mere filing of an affidavit of prejudice under 28 U.S.C., Section 144, automatically disqualifies the Judge against whom it is directed from further proceeding in the case.

Such statement is incorrect. No such conflict exists. In the *Berger* case, supra, certain questions were certified from the Court of Appeals relating to the sufficiency of an affidavit of personal bias or prejudice of a Federal District Judge who was to preside at a district trial. Your Honorable Court held in that case that the Trial Judge *could pass upon the legal sufficiency of the affidavit but not upon the truth or falsity of the facts therein affirmed.* This decision is completely in accord with the decision of the Court of Appeals which petitioner now

seeks to have reviewed. The language of the Court of Appeals (App. p. 4) was as follows:

> "The plaintiff has cited us a good deal of authority which he says establishes the proposition that when an affidavit of prejudice is filed a judge's power to proceed with the case is ended. We do not need to go into all of the ramifications of this question. Suffice it to say that the mere filing of the affidavit does not automatically disqualify the judge. He has the authority to decide whether the case is legally sufficient. And having disposed of this claim, he is free to act in the case."

It will be noted from the Court's opinion and from the docket entries that Judge Marsh ruled on the plaintiff's affidavit before he dismissed the complaint as to the defendants, other than Hirshhorn. He was then free to act in the case.

Plaintiff's petition not only fails to disclose any error on the part of the Court of Appeals in dismissing the appeal but fails to disclose the existence of any conflict or to otherwise demonstrate any basis for review by your Honorable Court.

Certiorari should be denied.

Respectfully submitted,

PAUL E. HUTCHINSON
GILBERT J. HELWIG
REED, SMITH, SHAW & MCCLAY
Attorneys for Respondents

FILE
DEC 31 19
JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

PETITION FOR REHEARING

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. GR. INC., LAW PRINTERS, 600-602 BLVD. OF ALLIES, PITTSBURGH 22, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Anne Livingston Behr respectfully represents:

1. On December 10, 1956, this Honorable Court denied the petition for writ of certiorari in the above entitled case.

2. The first reason assigned for granting the writ (Petition, pp. 12-14) was the sufficiency and automatic

action of the affidavit of plaintiff filed pursuant to Section 144 of the Judicial Code (App. 7a-10a) which was erroneously stricken by District Judge Marsh. Had the affidavit been found to be sufficient, certiorari should have been granted. Petitioner averred, inter alia, in her said affidavit (App. 7a) that "she believes the Honorable Rabe F. Marsh, Jr., is prejudiced and biased against her cause and her counsel"; and argued (Petition, p. 13) that under Pennsylvania law ". . . a challenge to a judge's qualifications because of prejudice and hostility toward an attorney brings the judge within the meaning of 'unable to sit in any matter' ".

3. The second reason assigned for granting the writ (Petition, p. 14) was the lower courts' discriminatory refusal to grant plaintiff's motions to strike and suppress, the granting of which would result in the granting of certiorari.

4. The third reason assigned for granting the writ (Petition, 14-16) relates and adds support to the second; and the fifth reason assigned for granting the writ (Petition, p. 16) relates and adds support to the first and second.

5. The prejudice and bias against petitioner's counsel is a relatively recent thing, non-existent up to a few years ago. For several years petitioner's counsel, in addition to his excellent reputation, enjoyed unusual popularity at the bar, having been elected an Officer of the The Allegheny County Bar Association both opposed and unopposed. However, during the past few years he has appeared as a plaintiff against powerful, influential persons and as attorney for plaintiff against powerful, influential persons with the result that his popular-

ity was transformed into decided unpopularity. When he became a Complainant in discliplinary proceedings against a Judge as well as influential members of the bar, then his unpopularity hit a new high. From that time on, it seemed to be standard practice for judges to misapply the law and procedural rules to dismiss all of his cases, and likewise on appeal. Then he became a plaintiff in federal court against Horace Stern, et al., individually and jointly as Justices of the Supreme Court of Pennsylvania, which made the bias against him obvious and intensified it. What perhaps originated as bias in favor of his adversaries resulted in bias against him, and it has extended into other Districts. In the instant case your petitioner has referred to the District Judge's bias also in favor of defendants with whose attorneys the Judge's brother is associated. Yet the bias against her cause and her counsel is best characterized by the averments of this paragraph. Therefore, the intervening and not previously presented circumstances hereinafter set forth should be brought to the attention of this Honorable Court in support hereof.

6. Since the filing of the petition for writ of certiorari intervening circumstances of substantial or controlling effect have occurred and have not been previously presented, as follows:

A. On November 26, 1956, the United States Court of Appeals for the Seventh Circuit at No. 11595 denied rehearing in the case of Paul Ginsburg, Plaintiff-Appellant, v. John D. Black, et al., not yet reported. In that case plaintiff filed motions to strike pleadings which were false, impertinent, scandalous, libelous per se and admittedly unprovable; which motions were not granted by

the district court and ignored by the Court of Appeals, plainly an abuse of discretion. This conflicts with the Order (App. 22-23) of the Third Circuit in the case of Paul Ginsburg, Plaintiff-Appellant, v. Horace Stern, et al., wherein the appellees successfully filed a similar motion to strike and suppress pleadings for allegedly being scandalous, which contained matters that are presumptively as well as assertedly true and pertinent. (Petition, pp. 9-10). The answered but undenied allegations of the 7 CCA Petition for Rehearing (ten copies of which are filed herewith and marked Exhibit "A") show further evidence of bias against your petitioner's counsel and in favor of his adversaries. In connection therewith it also shows how defendants therein "legally" cheated a Trust Estate out of millions of dollars and Paul Ginsburg out of his good name and earnings.

B. On December 18, 1956, in the case of Paul Ginsburg v. Horace Stern, et al., individually and jointly as Justices of the Supreme Court of Pennsylvania, Civil Action No. 14240 in the district court for the Western District of Pennsylvania, Judge John W. McIlvaine entered an Order dismissing the Complaint on the ground of judicial immunity from suits for violation of the Civil Rights Acts. In the first place, the defendants did not even plead immunity as a defense; and in the second place, under the law of the Third Circuit there is no such immunity (See *Picking v. Pennsylvania R. Co.*, 151 F2d 240). The law of the Picking case has been upheld by this Honorable Court in *Tenney v. Brandhove*, 341 U.S. 367, 97 L. Ed. 1019 (1951), which permitted only one specific exception. Counsel for the defendants is former Attorney General (Pa.) Herbert B. Cohen (and an associate) who therein committed errors

in law and procedure as well as breaches of the Canons of Professional Ethics. Cohen filed three preliminary motions which contained the most reckless, scandalous, false and impertinent allegations, obviously unprovable and insupportable. Within a few days thereafter, Paul Ginsburg filed a motion under Rule 11 to have Judge McIlvaine order Cohen to file written explanatory statements in court to show what good grounds, if any, exist to prove said allegations. In addition to Rule 11 the plaintiff cited in support thereof *US. v. American Surety Co.,* 25 F.Supp. 225; *American Automobile Ass'n, Inc., et al. v. Rothman,* 104 F.Supp. 655 (1952); and *Re: Disbarment of Morris Lavine,* 126 F.Supp. 39 (1954), reversed, 217 F2d 190, for denial of due process. Plaintiff argued that the granting of his motion under Rule 11, and Cohen's obvious inability to comply, could place him in position to move for summary judgment. Nevertheless, to protect Cohen from being a respondent under Rule 11 like in the Rothman and Lavine cases and to protect the defendants from an adverse judgment, and to continue the discriminatory actions against your petitioner's counsel, Judge McIlvaine ignored the motion which he should have acted upon at the outset. In Judge McIlvaine's Opinion, not yet reported, he stated that many of the defendants "are close personal friends"; and he criticized Paul Ginsburg for his charges of prejudice and conspiracy which he would not even require the defendants to answer and which must be taken as true. Judge McIlvaine seems completely unaware of his own bias. He apparently believes that Paul Ginsburg has had his day in court in that proceeding. In his opinion he stated, "He has not been denied his day in court, nor should he be". He believes this because one

day Paul Ginsburg was in court for an argument. He does not realize that, when he ordered the complaint dismissed by misapplying the law and federal Rules of Civil Procedure, he denied plaintiff his constitutional right to a day in court,—a right which Judge McIlvaine did not give him and which he cannot take away. It would necessarily follow that Judge McIlvaine believes Anne Livingston Behr, petitioner herein, has had her day in court simply because her counsel appeared several times before his Associate Judge Marsh just to try to get her day in court. Judge McIlvaine overlooked or misapprehended the point that his Associate Judge Marsh admitted in his Opinion ". . . mistakes of law in decisions I have made in the past in various phases of this and of another action." (See the last sentence of the third reason for granting the writ, page 16 of the Petition.) It is respectfully submitted that since Judge Marsh, to this day, has done nothing to correct these admitted mistakes, they can no longer be considered as mistakes.

C. Hon. John W. McIlvaine's Opinion which was unduly and unfairly critical of petitioner's counsel, at the same time praised defendant Horace Stern "as a great and good judge, and in the words of the Chief Judge of this Circuit, a 'Judge's Judge' ". Now your petitioner observes Judge McIlvaine as a Judge's Judge, for he deliberately omitted (with bias) the words of the Chief Judge of this District about the same Chief Justice Horace Stern, stated for the official record (not in a farewell address) in another suit of Paul Ginsburg v. Horace Stern, et al., now pending in 3 CCA at No. 12052, as follows: "said action (by Stern) and procedure that followed (by Stern) was contrary to established

rules and custom and was violative of basic concepts of justice".

D. Hon. John W. McIlvaine decided that the Chief Justice and the Associate Justices of the Pennsylvania Supreme Court not only are above the law, but also are above criticism. The Honorable George Wharton Pepper, Pennsylvania's leading lawyer, recently made a declaration for the bar and the citizenry that courts are not above criticism, not even the Chief Justice and the Associate Justices of this Honorable Court. His declaration went undenied and undisputed, and was accepted nationally. This Honorable Court has held time and again that nobody is above the law. Mr. Justice Douglas, dissenting in Tenney v. Brandhove, supra, held (pp. 381-3): "No other public official has complete immunity for his actions"; and "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends"; and "I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain". Here it is appropriate to refer to a recent situation in which the above mentioned Herbert B. Cohen while Attorney General of Pennsylvania perverted his power and brought down on petitioner's counsel the whole weight of government for an illegal or corrupt purpose; and Judge McIlvaine's refusal to grant said Motion under Rule 11 kept Cohen in position to do so. On October 22, 1956, in the Court of Quarter Sessions of the Peace In and For the County of Dauphin, Pennsylvania, No. 288 June Sessions, 1956, in the matter of the investigation of the Pennsylvania Turnpike Commission,

petitioner's counsel presented in open court a Motion for Leave to File a Petition to Enlarge the Scope of the Grand Jury Investigation,—to include an investigation of the Office of Attorney General Cohen. The court ordered said motion filed as part of the proceedings and took it under advisement. Two hours later Cohen had a criminal information charging libel lodged against petitioner's counsel for presenting said motion in court. Anybody learned in the law knows that the essential ingredient of publication is lacking; the occasion was absolutely privileged; and since the averments were directed at a public official who was also a candidate for public office, their truth or falsity is immaterial. Nevertheless the court in Dauphin County at No. 436 Sept. Sessions, 1956, has this 31st day of December, 1956, denied a Motion to Quash the Information. Cohen had this trumped-up, wholly insupportable libel charge broadcast widely by the wire services as well as radio and television; and his corrupt and illegal purpose in doing so was well served.

E. Petitioner is compelled to call to the court's attention one more situation to show the extent of the bias against her counsel, and how gravely in error Judge McIlvaine's Opinion is in respect to the Chief Justice and the Associate Justices of the Pennsylvania Supreme Court who considered the appeal of C. S. Helmig against Rockwell Manufacturing Company at No. 181 March Term, 1954. Helmig had secured a jury verdict of $177,811.20 for breach of contract, after which judgment n.o.v. was entered by the court for Rockwell, and affirmed by the Supreme Court. At that point Helmig's attorney abandoned all hope and withdrew. Petitioner's

counsel, Paul Ginsburg, entered his appearance for Helmig and through succeeding procedural steps won the case for Helmig but only on the record. The record finally became cleansed by defendant's sworn admission that the sole basis for the judgment n.o.v. had been eliminated. At that stage petitioner's counsel on behalf of Helmig presented a Petition (ten copies of which are filed herewith and marked Exhibit "B") which showed that the Court had no alternative but to open up and vacate the judgment n.o.v. and reinstate the jury verdict then worth in excess of $200,000.00. The petition was denied. Subsequently, the lower court Judge wrote a letter to petitioner's counsel admitting he was wrong, but would not correct it. Promptly petitioner's counsel filed a Petition for Reconsideration quoting said letter (ten copies of which are filed herewith and marked Exhibit "C"), which was denied on October 6, 1956. Here was a case before the Pennsylvania Supreme Court with the record showing admissions by the defendant and the court below that they were wrong, and still a stubborn, biased refusal to grant legal relief to Paul Ginsburg's client.

7. It is respectfully submitted that if Judge McIlvaine really believes the legal address of Judges is in care of The Ivory Tower, Somewhere In Heaven, he should be reminded that he and his Associates and Superiors have been appointed for "good behavior", which negates the impossibility of bias and corruption; that for several years the leading Bar Associations have sponsored judicial reform movements aimed at the elective system of judges, to keep politics and political decisions off the bench, and the chief advocate thereof is the Honorable Arthur T. Vanderbilt, Chief Justice of New

Jersey, whose principal target has been the Commonwealth of Pennsylvania; and that the procedure for impeachment of judges has been sucessfully invoked from time to time, which also negates the absence of bias and corruption. Perhaps this reminder will bring Judge McIlvaine back down to earth, where judges are sworn to uphold the Constitution and to dispense Equal Justice under The Law.

Wherefore, your petitioner prays that the Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.